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No. 08-764

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

ROSLYN PORTER,

Petitioner,

v.

NATIONSCREDIT CONSUMER DISCOUNT COMPANY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF

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INTRODUCTION

Respondents allege six reasons for denying the Petition. *Opposition* at 12-28. Moreover, Respondents spend much effort in their Brief on facts and issues that are not at all germane to this Petition. Each of Respondents' reasons for denial lacks merit as shown below because:

1. Petitioner raises an important federal question under the Truth In Lending Act (TILA) whether charges labeled "premiums" can properly be excluded from finance charges when there is admittedly not risk transferred to the "insurer"—or contain hidden finance charges; and does *not* seek review of any state law claims;

2. Respondents violated TILA by not including charges for "premiums" as finance charges, as required by TILA because admittedly no risk was transferred to the alleged insurer due to a guaranty by a beneficiary of the "policy" to the "insurer" that it would be "reinsured."

3. Alternatively, the "premiums" contain hidden finance charges paid to Respondents under an alleged "recapture agreement" that was unsupported by consideration, which were not disclosed as such in violation of TILA.

4. The Third Circuit has split with this Court's precedent, and the Fifth and Seventh Circuits, when upholding the district court's refusal to examine the substance of an alleged insurance relationship to determine whether "premiums" are in fact finance charges.

5. Although Circuit Courts have ruled that reliance is required for actual damages under TILA, these decisions conflict with this Court's pronouncements in *Bridge v. Phoenix Bond & Indemnity Co.* by imposing such a requirement where Congress has not.

6. Although the Court below's decision is non-precedential, the decision has significant impact on Petitioner, who lost her home at a Marshall Sale, and a putative national class of over 62,000 consumers who were charged $103 million for "premiums" or alternatively $32 million and interest thereon.

ARGUMENT

I. Petitioner Raises Important Federal Questions—And No State Law Claims—And Much Of Respondents' Opposition Addresses Factual And Procedural Statements And Arguments Not Raised In The Petition—And Furthermore Mis-states The Case Below.

As an initial matter, this Petition raises limited issues under the TILA of whether certain charges were properly excluded from the Finance Charges disclosed to Petitioner in her loan. The Court below did not properly analyze that contracts and facts in this case when deciding this issue. In addition, this Petition also seeks review of the decision below that detrimental reliance is required for actual damages under TILA.

This Petition does *not* raise the following issues:

1. Any state law claims or claims against Protective Life Insurance Company, who was not included as a

Respondent here because only state law claims were raised against them below;

2. Whether the itemization of Amount Financed was correctly disclosed under Section 1638 of the TILA (what Respondents call the 'fee-splitting claim");

3. Whether the purchase of credit life insurance was voluntary;

4. Whether TILA required that Petitioner be given a signed copy of her request for credit life insurance; and

5. The trial court's decision that Petitioner knew she purchased "credit life insurance".

Thus, much of Respondents' Opposition discusses facts, procedural history and legal arguments that are immaterial to the Petition.

In addition, Respondents mis-state the case below to support their Opposition. First, by stating that the gravamen of Petitioner's Complaint was that she did not want insurance is a misstatement of this case—or at best a partial statement of this case. *Opposition* pgs. 1, 3. The issues of actual damages and lack of true insurance were raised clearly in the Second Amended Complaint, (which superseded that Complaint cited by Respondents), which was the Complaint analyzed by the District Court in its decision on the Motion to Dismiss. These claims were never waived and Respondents do not claim they were. Respondents merely attempt to shift focus to issues not germane to this Petition.

Second, casting as a solely state law claim that the premiums are not for insurance or contain hidden finance charges claim mis-states this case—or at best demonstrates a mis-comprehension of the TILA claims presented. *Opposition* at pgs 12-18. Indeed, the Second Amended Complaint clearly alleges on behalf of Petitioner and the proposed class that,

> "Defendant(s) retained all or a portion of the "premium" charged to the borrower/class that were in fact not paid to an insurance company at all, or Defendant(s) ultimately received all or a portion of the "premiums" that were disclosed as premiums solely for credit life and/or disability insurance, thereby violating the Truth in Lending Act, 15 U.S.C.§1601 et seq.:" Para. 52c. (Also, para 55c, Third Amended Complaint).

The TILA Prayer for Relief seeks, "an Order awarding actual damages to each class member, including without limitation, return of all insurance premiums, plus interest charged therein." (Also sought in Third Amended Complaint).

Thus, to cast the claim as a state law claim solely is an exercise in legal sleight-of-hand by Respondents. Petitioner does not seek review of the decisions on the state law claims—only of the TILA claims.

Third, Respondents mis-state the finding below that only NCCDC is the only creditor in this case. *Opposition* pg.3. The Court below found that NCCDC's successor, NationsCredit Financial Services Corporation, is also a

creditor under TILA. Because the Court denied class certification, it did not decide whether other Respondents are creditors for TILA and HOEPA. Petitioner requested this ruling be re-visited in the event she is successful in this Petition. *Petition* at 7.

Thus, Respondents' arguments either mis-comprehend Petitioner's TILA claims or are nothing more than legal sleight-of-hand to avoid review by this Court. As shown in her Petition and below, the Petition should be granted.

II. The "Premiums" Are Finance Charges Or Contain Hidden Finance Charges And Respondents' Argument That A Reinsurance Relationship Exists Lacks Merit.

Respondents argue that because Petitioner is not in privity with the "reinsurer", there is a legitimate reinsurance relationship. This argument does no more than beg the question and assume away the issue at hand. The central issue is whether an insurance relationship exists when a beneficiary guarantees that the "insurer" will not be liable on a claim. Deposition witnesses testified the purpose of the guaranty was so that the "insurer", Protective, would have no risk. Without any risk to the insurer in the first instance, there can be no risk to reinsure.

Moreover, Respondents' argument does nothing more than restate the principles that govern actual reinsurance agreements where risk is shifted from an initial insurer to another insurer. *Not one case* cited by Respondents includes a guaranty such as is present

here. Simply describing a legitimate reinsurance relationship does not in itself transform the transaction here into such a relationship.

Respondents attempt to distinguish *Edwards* and *Adams* by claiming these cases involved stop-loss provisions that capped losses to the insurer at less than the total premiums paid. *Adams v. Plaza Finance Co.*, 168 F.3d 932 (7th Cir. 1999); *Edwards v. Your Credit, Inc.*, 148 F.3d 427 (5th Cir. 1998). This distinction does not support a finding of a legitimate insurance relationship.

Here, the guaranty prevented loss from being shifted to Protective *at all*. Thus, the guaranty is greater indication of no insurance relationship than the stop-loss caps in *Edwards* and *Adams*. Moreover, if there was risk shifted to Protective, there can be no consideration for the later alleged "recapture' of risk by Protective to support the $32 million "recapture fee".

Respondents simply cannot have it both ways. Either the "premium" is not for insurance because of the guaranty; or, if there is an insurance relationship because risk shifted to Protective, the recapture fees are hidden finance charges because there is no risk "recaptured" by Protective justifying the $32 million "recapture fee" paid to Respondents that Petitioner argues was passed through to Key Executives.

Thus, either the premiums or the recapture fees are finance charges under TILA. Because these were included in the Amount Financed instead of the Finance Charges, as required by TILA, Petitioner was charged interest on these amount, and her Annual Percentage

Rate ("APR") was higher than disclosed. At a minimum, the interest charged on these charges constitutes actual damage to Petitioner and the potential class.

As further support for their position, Respondents mis-state the facts concerning the September, 1999 "recapture" when alleging that the recapture "terminated the parties' indemnification rights, guaranties and obligations under the reinsurance." *Opposition* pg. 16.

This is unsupported by documentary evidence. A letter, dated December 10, 2000, between corporate officers of Protective and the reinsurer, NationsCredit Insurance Corporation (NCIC), acknowledges the continuation of the guaranty and indemnification obligations *after* the alleged "recapture" and termination. Indeed, Protective's actuary, who testified *under oath* that the "recapture" terminated NCIC's risk was a *party* to the letter acknowledging the continuation of the guaranty and indemnification obligations dated *after* the alleged "recapture" and termination.

At best, the evidence below is conflicting on the effect of the "recapture", with the testimony of the corporate deponents differing with documentary evidence. On the one hand, the deponents testified that the recapture ended NCIC's risk; on the other hand, a post-"recapture" letter between two corporate officers acknowledges that these obligations remained despite the "recapture."

Thus, rather than accusing Petitioner's counsel of imagining schemes, the Court below should have

analyzed the facts presented to it. This Court's holding in *Ford Motor Credit Co. v. Cenance*, 452 U.S. 155, 68 L. Ed. 2d 744, 101 S. Ct. 2239 (1981) requires such an analysis under the TILA. This Court's holdings in *Helvering v. LeGierse*, 312 U.S. 531, 85 L. Ed. 996, 61 S. Ct. 646 (1941), *Keller v. Commissioner*, 312 U.S. 543, 85 L. Ed. 1032, 61 S. Ct. 651 (1941) and *Colonial American Life Insurance Co. v. Commissioner*, 491 U.S. 244, 105 L. Ed. 2d 199, 109 S. Ct. 2408 (1989) require such an analysis for insurance transactions.

Had the Court below engaged in proper analysis, it would have found that TILA was violated. By affirming the District Court, the Third Circuit placed its *imprimatur* on this error. The Court below should be reversed.

III. The Court Below And Other Circuits Have Imposed An Improper Requirement Of Detrimental Reliance That Is Absent From The Statute Itself And Rejected By Congress.

Respondents argue that Petitioner's argument that detrimental reliance is not required by the TILA for actual damages is tantamount to imposing a "black letter law" on federal statutes. *Opposition* at 26. Respondents' argument proves too much.

To the contrary, Petitioner argues, as this Court found in *Bridge v. Phoenix Bond and Indemnity Co.*, __ U.S. __, 128 S. Ct. 2131 (2008) that is it the purview of Congress and not a Court to impose such a requirement in a federal statute. This is the central holding of *Bridge* and should be followed here.

Moreover, the Court in *Bridge* reasoned that "reliance is a specialized condition that happens to have grown up with common law fraud . . ." and "That 'specialized condition' whether characterized as an element of the claim or as a prerequisite to establishing proximate causation, simply has no place in a remedial scheme keyed to . . . a statutory offense that is distinct from common law fraud and that does not require proof of reliance." __ U.S. __, 128 S. Ct. at 2143. The TILA is even *more* distinct from common law fraud than a Civil RICO claim in that TILA is not a statute predicated at all on fraud.

In addition, Respondents erroneously argue that the District Court found no misrepresentation in this case for purposes of a state law claim to somehow support their argument that reliance is required under TILA. Respondents argue that the *Bridge* Court cautioned that in a RICO case, a complete absence of reliance may prevent a plaintiff from establishing proximate causation and that in most cases a plaintiff will not be able to establish but-for causation if no one relied on the misrepresentation. *Opposition* at 25. Respondents fail to recognize that the TILA is not a fraud statute, but a disclosure statute. Thus, imposing a requirement of reliance on a *misrepresentation* imposes yet another requirement absent from the TILA.

Finally, Respondents argue that *Bridge* is a narrow holding limited to Civil RICO claims and limited to cases of third party reliance, i.e., the absence of first party reliance on the misrepresentation. *Bridge* is not so narrow a holding on the issue of reliance, as shown above. Rather, in *Bridge* this Court expounded on the

proper interpretation by a Court of a federal statute. To hold that reliance is required for actual damages under TILA, in the absence of a facial statutory requirement, when one is not required by a civil statutory fraud claim would result in a higher statutory standard for a non-fraud TILA based statute than for a fraud-based RICO statute. Such a result, if intended by Congress, should be clearly explicit on the face of TILA, and it is not.

Finally, finding no detrimental reliance requirement for actual damages under TILA does no damage to the statutory scheme. In *Perrone v. General Motors Acceptance Corp.*, 232 F.3d 433 (5th Cir. 2000), the Court reasoned that the inclusion of statutory damages that do not require causation undermines the argument that detrimental reliance is not required for actual damages. This reasoning is defective because it conflates causation and reliance.

Statutory damages require *neither* causation or reliance. Under TILA, statutory damages are available for non-compliance with disclosure requirements that result in *no monetary damages* to the consumer. For example, failure to give the correct number of Notices of Right to Cancel gives rise to statutory damages without any monetary injury to the consumer, *Apgar v. Homeside Lending, Inc.*, 291 B.R. 665 (E.D. Pa. 2003); *Williams v. BankOne*, 291 B.R. 636 (E.D. Pa. 2003); as does not filing in the correct date for rescission, *Armstrong v. Nationwide Mortg.* Plan, 288 B.R. 404 (B.R. Pa. 2003).[1]

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1. In addition, these violations might give rise to a right to rescind the loan, if exercised within 3 years under TILA. *Beach v. Ocwen*, 532 U.S. 410 (1998). After the 3 year date, statutory damages can be asserted by way of recoupment, 15 U.S.C. § 1640(e).

Actual damages require causation but not reliance, unless imposed by Congress in the statute itself. Thus, the inclusion of a statutory damages provision does not, as reasoned by the *Perrone* Court, constitute evidence in itself that Congress meant to require detrimental reliance as an element of actual damages. The actual damages in this case are monetary in the form, at a minimum, of the interest charged on the "premium" or "recapture fee." To require detrimental reliance for actual damages under TILA, imposes a higher standard under TILA than for fraud-based federal statutes such as RICO and Securities Fraud cases. This result turns statutory construction on its head.

As shown by Petitioner in the Petition, Congress considered and rejected a detrimental reliance requirement; such a requirement is not explicit on the face of TILA; and a Court overreaches when imposing one, regardless of the number of Courts doing so. Moreover, as shown in the Petition, no Court of Appeals has addressed the exact issue presented here of whether detrimental reliance is required for actual damages for a statutorily- defined material disclosure violation under TILA. Thus, this Petition raises an important federal question that has not been but should be resolved by this Court under rule 10c and the Petition should be granted.

IV. The Court Below Decided An Important Federal Question In A Way That Conflict With This Court's Precedents.

Respondents argue that because the decision below is non-precedential it should not be reviewed by this Court. However, as shown above, the decision below conflicts with several precedents of this Court; namely, *Ford Motor Credit v. Cenance*, 452 U.S. 155 (Court should analyze substance of transaction under TILA); *Helvering v. LeGierse*, 312 U.S. 531, *Keller v. Commissioner*, 312 U.S. 543, and *Colonial American Life Ins. Co. v. Commissioner*, 491 U.S. 244 (Court must examine substance of alleged insurance transaction based upon all contracts to determine if risk is transferred) and *Bridge v. Phoenix Bond & Indemnity* __ U.S. __, 128 S. Ct. 2131 (Court should not impose a reliance requirement where Congress has not done so on the face of a statute).

In addition, as shown above, the Petition raises important federal questions that have not been and should be resolved by this Court. Thus, this Petition meets the requirements of Rule 10c of the Rules of this Court and should be granted.

Moreover, as a result of the decision below Petitioner lost her home in a Marshall Sale. Furthermore, the decision below to deny class certification flows from the Court's decision that detrimental reliance is required for actual damages under TILA. Contrary to Respondents' argument, Petitioner has not waived these claims on behalf of the class, but specifically requested that class certification be re-visited in the

event the decision below is reversed. *Petition* at 33. Thus, in the event Petitioner is correct, Respondents are potentially liable for substantial damages to the potential class of consumers who were charged approximately $103 million for "premiums" or the hidden finance charges of approximately $32 million, plus interest thereon. Such potential liability based upon interpretation of a federal statute has been said to be a strong factor in the decision whether to grant a Petition for Certiorari. *Fid. Fed. Bank & Trust v. Kehoe*, 547 U.S. 1051 (2006) (Justice Scalia and Alito), regardless of whether the decision below is non-precedential.

CONCLUSION

For the above reasons, Petitioner respectfully requests that this Court grant the Petition. The Court below erred when (1) dismissing the claim for actual damages under TILA; (2) denying class certification; (3) refusing to examine the substance of the alleged "credit life insurance" transaction to find no TILA violation; and (4) entering judgement against Petitioner and in favor of Respondents.

Respectfully submitted,

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